

IT 03-9

Tax Type: Income Tax

**Issue: Withholding Tax – Failure to File Return/Make Payment
Reasonable Cause on Application of Penalties**

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC AUTOMOTIVE, INC.,
Taxpayer**

**No. 00-IT-0000
FEIN: 00-0000000
Tax yr.: 1999**

**Charles E. McClellan
Administrative Law Judge**

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appearances: Ricky A. Walton, Special Assistant Attorney General, for the Illinois Department of Revenue (the “Department”); Diane M. Anderson, of Neal, Gerber & Eisenberg, for ABC Automotive, Inc. (formerly known as XYZ Auto Equipment Company, Inc. and referred to herein as “ABC”).

Background:

This matter arose from a timely protest filed by ABC to a Notice of Deficiency issued to ABC by the Department on February 27, 2001. The Notice of Deficiency assessed penalties for late payment of withholding tax for all quarter-monthly periods during 1999 pursuant to Illinois Income Tax Act § 1002(c) and the Uniform Penalty and Interest Act § 3-3 (b), (b-5) and (c).¹ Prior to the commencement of an evidentiary hearing, ABC filed its motion for summary

¹ Unless otherwise noted, all statutory references are to 35 ILCS 5/101, *et seq.*, the Illinois Income Tax Act (“IITA” or the “Act”) and to 35 ILCS 735/1, *et seq.*, the Uniform Penalty and Interest Act. (“UPIA”).

judgment. The Department responded with its cross-motion for summary judgment. The parties agree that there is no genuine issue of material fact, and that summary judgment is appropriate.

The issues in this case raised by the motions are as follows:

1. Whether ABC made timely withholding tax payments during 1999;
2. Whether the Department correctly applied ABC's withholding tax payments to ABC's liability and properly calculated the late payment penalty;
3. Whether ABC established reasonable cause to justify the abatement of the late payment penalty.

ABC agrees that it was required to make quarter-monthly payments for 1999 and that it paid its withholding tax on a monthly basis until March 2001. ABC states that the disagreement is about which payments were actually late and the requirements for reasonable cause.

I recommend that ABC's motion be denied, and that the Department's cross-motion for summary judgment be granted.

Facts Asserted by ABC:

The factual assertions relied on by ABC are supported by the affidavit of John Doe². This affidavit is attached to, and incorporated into, Taxpayer's Brief in Support of its Motion for Summary Judgment.³ These assertions are as follows:

1. For the 1999-year, the year in issue, ABC was required to make quarter-monthly payments of withholding tax pursuant to Section 704(b) of the Illinois Income Tax Act, but it continued its practice of paying its withholding tax on a monthly basis until March 2001. Doe aff. ¶ 4.

² Mr. Doe has been employed by ABC as its Executive Director of Tax since 1989. Mr. Doe is a certified public accountant and an attorney admitted to practice in Illinois. Doe aff. ¶¶ 1 & 2. His affidavit is cited herein as "Doe aff. ¶ _."

³ The Taxpayer's Brief in Support of its Motion for Summary Judgment is referred to herein as "ABC br. p. _."

2. Prior to November 15, 1996, ABC had very few Illinois employees (“approximately a couple of salesmen”) and its Illinois withholding taxes were less than \$1,000 per month. Accordingly, it paid its Illinois withholding taxes by the fifteenth day of the following month. For ABC during that time period, that payment schedule was timely under IITA § 704(c). *Id.* at ¶ 5.
3. On November 15, 1996, ABC underwent a corporate reorganization, in which ABC changed its name from XYZ Auto Equipment, Inc. to ABC Automotive, Inc. The reorganization transferred approximately 100 Illinois employees to ABC from an affiliate (the Fuel Gas Pipeline Co., Inc.). These additional employees caused the Illinois withholding tax to exceed \$1,000 per month. At that level of withholding, ABC’s withholding tax payments were due on a quarter-monthly basis. *Id.* at ¶¶ 5 & 6.
4. ABC began making quarter-monthly payments with its March 8, 2001 payroll after it received the Notice of Deficiency dated February 27, 2001. *Id.* at ¶ 8.
5. Ms. Jane Doe, an experienced payroll tax specialist who had worked for ABC since 1981, was responsible for ABC’s Illinois withholding tax filings and payments from August 1996 through April 2000. *Id.* at ¶ 13.
6. Ms. Doe was responsible for all return filings and payments of federal payroll taxes and withholding and unemployment taxes in Illinois and approximately 40 other state and local jurisdictions for ABC and approximately six other affiliates. She prepared, signed and mailed ABC’s federal and state payroll tax filings and made the related tax payments. *Id.* at ¶ 22.
7. Ms. Doe was authorized to make tax payments by electronic funds transfer (“EFT”). She also submitted check requests to the accounts payable department for tax payments made by check. *Id.*

8. Ms. Mary Doe, a certified public accountant (“CPA”), supervised Ms. Doe. *Id.* at ¶ 13.
9. Ms. Doe and Ms. Mary Doe were employees of ABC Business Services (“BUSINESS”) until December 31, 1999. BUSINESS was a division of ABC Packaging, Inc., a subsidiary of ABC that provided payroll and other administrative services to ABC and its affiliates. *Id.* at ¶ 16.
10. On December 31, 1999, BUSINESS sold its operations and assets to XXX, Inc. (“XXX”) at which time Ms. Doe, Ms. Mary Doe and other BUSINESS employees transferred to XXX, Inc. *Id.*
11. XXX is a firm that provides human resource and payroll services to large companies that want to outsource these functions. *Id.* at ¶ 18.
12. XXX has advertised that its clients include the Bank, one of the largest U.S. banks; one of the largest oil companies in the world; ABC Paper Co.; XXX Financial Co. and New Company, as well as its strategic alliance with the M & M public accounting firm. *Id.*
13. On January 1, 2000, ABC outsourced its payroll, its federal and state payroll tax compliance responsibilities, and its accounts payable processing to XXX. *Id.* at ¶ 16.
14. No one at ABC, BUSINESS or XXX noticed that ABC’s frequency of depositing Illinois withholding tax was in error until the Department issued the Notice of Deficiency on February 27, 2001. *Id.* at ¶ 21.
15. ABC performed an internal audit of its payroll system in December 2000, approximately, that included a study of internal control and confirmed that the right amount of tax was withheld from employee paychecks but did not detect any error regarding the deposit frequency for Illinois withholding taxes. *Id.* at ¶ 30.

16. Arthur Andersen LLP audited ABC's financial statements for the years ended December 31, 1995 through December 31, 2001. It did not inform ABC of any error regarding payroll tax administration. *Id.* at ¶ 31.

Facts Asserted by the Department:

The factual assertions relied on by the Department are supported by the affidavits of Melody Lyons⁴ and Domenica Dunkirk.⁵ These affidavits are attached to, and incorporated into, the Department's Memorandum in Support of its Cross-Motion for Summary Judgment and Response to Taxpayers' [sic] Motion for Summary Judgment⁶. The Department's factual assertions are as follows:

1. On November 15, 1996, the Fuel Gas Pipeline Co., Inc. was transferred to XYZ Auto Equipment Company, Inc, and it changed its name to ABC Automotive Inc. on that same date. Dept. memo p. 6, Dept. Ex. No. 3.
2. During 1996, ABC made six monthly withholding tax payments in excess of \$1,000. Dept. memo p. 5, Dept. Ex. No. 8.
3. On August 8, 1997, ABC Automotive Co. registered with the Department as a quarter-monthly filer and was recorded as such on the Department's Central Registration System. *Id.*; Lyons aff. ¶¶ 20 & 21.
4. On or about April 15, 1997, Ms. Dunkirk sent XYZ Auto Equipment Company, ABC's predecessor, a letter and a copy of the Department's *Electronic Funds Transfer Guide 1997*

⁴ Melody Lyons has been employed as a Revenue Auditor III by the Department since 1993 and is assigned to the Department's Audit Bureau, Office Programs Division. Her affidavit, identified as Exhibit 2 to the Dept. memo, will be referred to herein as "Lyons aff. ¶ _."

⁵ Domenica Dunkirk, an employee of the Department since August 24, 1970, was employed as a Public Service Administrator by the Department during 1996 through 1999. Her affidavit, identified as Exhibit 12 to the Dept. memo, will be cited as "Dunkirk aff. ¶ _".

⁶ The Department's Memorandum in Support of its Cross-Motion for Summary Judgment and Response to Taxpayers' [sic] Motion for Summary Judgment is referred to herein as "Dept. memo p. _".

(the “EFT Guidebook”) that explained the requirements for paying withholding taxes electronically. Dept. memo p. 6; Dunkirk aff. ¶¶ 9-11.

5. The EFT Guidebook informed EFT taxpayers that withholding tax payments are due within three days after the close of the current quarter-monthly period if and when the amount of cumulative withheld tax exceeds \$1,000. Dept. memo p. 7; Dunkirk aff. ¶ 16.
6. The 1997 EFT Guidebook also informed EFT taxpayers that monthly withholding tax payments are permissible if the cumulative amount of withholding taxes is between \$500 and \$1,000, and that such payments are due on the 15th of the following month. Dunkirk aff. ¶ 17.
7. The 1997 EFT Guidebook informed taxpayers that the “quarter-monthly periods end on the 7th, 15th, 22nd and the last day of each month, that paying by EFT does not change the required due date, and that late payments may result in penalties and interest being incurred. Dunkirk aff. ¶ 18.
8. ABC discarded the 1997 EFT Guidebook. Dept. memo p. 6, Dept. Ex. No. 9, p. 2.
9. The Department also sends its *IL-941 Employer’s Withholding Tax Coupon Book* (“Coupon Book”) annually to all employers, including those paying taxes via EFT. The Coupon Book also sets forth the monthly, semi-monthly, and quarter-monthly payment requirements. Dept. memo p. 7, Dept. Ex. 13.
10. During 1996, six of ABC’s monthly withholding tax payments exceeded \$1,000. Dept. memo p. 5, Dept. Ex. No. 8, p. 4.
11. ABC’s November and December 1996 withholding tax amounts were \$117,322.10 and \$138,390.35, respectively, which were paid on December 17, 1996, and January 15, 1997, respectively. *Id.*

12. During 1997, each of ABC's monthly withholding tax payments exceeded \$32,000, and it continued to deposit them on a monthly basis. *Id.*, Dept. Ex. No. 10, pp. 1-4.
13. During 1998, ABC's monthly withholding tax payments exceeded \$40,000, but it continued to deposit them on a monthly basis. *Id.*, Dept. Ex. No. 11, pp. 1-4.
14. During the calendar year 2000, ABC was selected randomly in an audit project designed to determine the level of compliance with statutory requirements for timely payment of withholding taxes. Dept. memo p. 3, Lyons aff. ¶¶ 8 & 9.
15. On or about February 8, 2000, the Department sent ABC an audit package that included a document entitled *Illinois Withholding Worksheet* (the "Worksheet") which included instructions regarding its completion and return to Ms. Lyons at the designated address. Lyons aff. ¶ 10.
16. The Worksheet instructed ABC to list each payday during 1999, stating for each payday the amount of wages ABC paid to its Illinois employees, the amount of taxes withheld, and the dates and amounts of withheld taxes ABC remitted the to the Department. *Id.* at ¶ 11.
17. Because the Department had no record of receiving the completed Worksheet from ABC, it sent a follow-up letter to ABC on April 11, 2000 reminding ABC that the completed Worksheet was due to be filed by April 3, 2000. *Id.* at ¶ 12.
18. ABC failed to respond to the April 11, 2000 letter and to several telephone calls made by the Department to ABC, so the Department completed the audit using ABC's payment history maintained by the Department which showed that ABC made the following payments of withholding taxes during 1999:

<u>Month taxes were withhold</u>	<u>Amount Paid</u>	<u>Date paid</u>
January 1999	\$118,464.78	February 12, 1999
February 1999	48,616.77	March 12, 1999

March 1999	37,275.10	April, 14, 1999
April 1999	42,442.34	May 14, 1999
May 1999	104,408.36	June 14, 1999
June 1999	42,354.27	July 14, 1999
July 1999	34,486.70	August 12, 1999
August 1999	45,917.50	September 14, 1999
September 1999	38,935.89	October 14, 1999
October 1999	40,958.24	November 12, 1999
November 1999	127,194.80	December 14, 1999
December 1999	53,305.50	January 13, 1999

Id. at ¶ 18.

19. The Department determined that ABC's quarter-monthly withholding taxes for 1999 were in excess of \$1,000 per period by dividing each monthly payment of withholding taxes by 4.

Then the Department calculated the penalty and interest for each of these quarter-monthly liabilities. *Id.* at ¶¶ 21-25, 29.

20. On February 27, 2001, the Department issued ABC a Notice of Deficiency assessing penalties and interest calculated as described above. Dept. Ex. No.1.

21. The Department's calculations of ABC's quarter monthly withholding taxes for 1999 and the penalties and interest assessed were based on the only information available. Lyons aff. at ¶ 28.

Taxpayer Arguments

The Department's penalty assessment is improper because it does not reflect the timing of the actual tax payments that ABC made. For example, the payment ABC made on February 12, 1999 for the tax withheld in January 1999, \$118,464.78, should have been reapplied as follows:

Payroll Date	Tax Payment Due	Tax Withheld	Feb. 12, 1999 payment applied
02/05/99	02/18/99	348.87	348.87
02/12/99	02/18/99	29,399.20	29,399.20
02/19/99	03/03/99	340.83	340.83
02/26/99	03/03/99	18,441.76	18,441.76

03/05/99	03/18/99	326.15	326.15
03/12/99	13/18/99	303.72	303.72
03/15/99	03/18/99	18,377.42	18,377.42
03/19/99	04/05/99	367.94	367.94
03/25/99	04/05/99	8.16	8.16
03/26/99	04/05/99	381.00	381.00
03/31/99	04/05/99	17,596.82	17,596.82
04/02/99	04/20/99	373.43	373.43
04/09/99	04/20/99	365.69	365.69
04/14/99	04/20/99	1,164.90	1,164.90
04/15/99	04/20/99	21,433.75	21,433.75
04/16/99	05/05/99	308.57	308.57
04/23/99	05/05/99	898.99	898.99
04/30/99	05/05/99	8,027.58	8,027.58
Total applied			118,464.78

ABC br. pp. 2-5, Doe aff. ¶¶ 32-41 and Attachment 1⁷.

According to ABC, this reapplication theory would reassign each of the monthly payments ABC made on or about the 15th of the month throughout 1999 as well as for the payment made on January 13, 2000. This reallocation is required by the IITA and the UPIA. ABC's withholding tax payments are timely except for the January 1999 and a portion of the November 30, 1999 payrolls. The reallocation calculation results in a penalty of \$25,438.79, excluding interest, instead of \$146,871.86 as assessed. The amount of penalty assessed by the Department is exorbitant and violates the eighth amendment to the U.S. Constitution that bars excessive fines and cruel and unusual punishment. The reduction of the penalty from 20% to 15% by the General Assembly demonstrates its intent to limit the harshness of the penalty.

Further, ABC states that it did not willfully fail to comply with the quarter-monthly payment requirement and it was in substantial compliance with the withholding statute. Relief should be granted under the substantial compliance doctrine that is applied in federal income tax cases. ABC satisfied the substantial compliance doctrine because the late payment penalty is a

procedural provision that is intended to encourage taxpayers to make tax payments on time. The Department should apply the federal provision in the Internal Revenue Code, 26 U.S.C § 6656(e) that allows a taxpayer to designate a payment to a particular payroll for up to 90 days after the date of a penalty notice. This provision in the Internal Revenue Code was intended to prevent “cascading penalties” wherein multiple late payment penalties are triggered by a single late payment that occurs early in the period.

Additionally, ABC asserts that all proposed penalties should be cancelled for reasonable cause for the following reasons. ABC’s payroll tax staff prepared and filed all tax returns in good faith following standard and customary business practices. No one on ABC’s staff was aware that the withholding tax payments were late until the Department issued the Notice of Deficiency on February 27, 2001. ABC relied on competent accountants, one of which was a CPA, to handle the responsibility of complying with the Illinois payroll tax requirements. ABC’s situation is the same as the recommendations adopted by the Director in administrative hearing opinions IT 02-5 and IT-01-14 in which penalties were abated although the taxpayers failed to pay withholding taxes on a quarter-monthly basis as required by the statute. The Department failed to notify ABC that it was not complying with the quarter-monthly payment requirement.

Department Arguments

The Department initially argues that the affidavit of Mr. Doe contains conclusions, opinions, and statements not based on personal knowledge, and for that reason that it must be stricken.

Further, the Department argues that it calculated the penalty correctly as required by the statute, and it applied ABC’s withholding tax payments as required by the statute. There is no

⁷ The reassignment of the February 12, 1999 payment shown above is taken from Attachment 1 to the Doe aff. that sets forth ABC’s proposed reassignment of its payments for the entire 1999-year.

provision in the statute or the regulations that would allow ABC's payments to be reassigned as it asserts. Also, the penalty provision is not a procedural provision and the substantial compliance doctrine does not apply. The Department denies that the penalty provision violates the eighth amendment of the U.S. Constitution's bar against excessive fines and cruel and unusual punishment. It concludes that willfulness is not an issue in this case, and that the public act that reduced the penalty rate from 20% to 15% did not change the statutory formula for calculating the penalty. Finally, the Department argues that ABC has not demonstrated reasonable cause.

Conclusions of Law:

Summary judgment is appropriate where there is no genuine issue of material fact and a movant is entitled to judgment as a matter of law. *Eidson v. Audrey's CTL, Inc.*, 251 Ill. App. 3d 193, 621 N.E. 2d 921 (5th Dist. 1993), *app. den.*, 154 Ill.2d 558, 631 N.E. 2d 706 (1993). It also is appropriate when the parties dispute the correct construction of an applicable statute. *Bezan v. Chrysler Motors Corp.*, 263 Ill. App. 3d 858, 636 N.E. 2d 1079 (2nd Dist. 1994). In this case, the parties agree that there is no genuine issue of material fact. The issues depend on the proper construction of the statutory withholding tax and penalty provisions as they apply to the facts of this case.

Considering first the Department's allegations regarding Mr. Doe's affidavit, the Department is correct in asserting that it contains conclusions, opinions and statements not based on his personal knowledge. The Department cited the following examples:

Doe aff. ¶ 5: In this paragraph, the affidavit states that ABC's failure to file on a quarter-monthly basis in 1999 "was caused by the November 15, 1996 corporate reorganization in which ABC changed its name from XYZ Auto Equipment, Inc. to ABC Automotive, Inc. Before that

ABC had very few employees (approximately a couple of salesmen) and its Illinois withholding taxes were less than \$1,000 per month.” The Department asserts that this is a conclusion or an opinion because the reason for ABC’s failure to make timely withholding tax payments has not been established.

Id. at ¶ 7: The first sentence of this paragraph states that, “No one who was involved in the 1996 reorganization or who was on the payroll staff realized that this changed the due dates for ABC’s Illinois withholding tax payments.” The Department asserts that this statement is not based on the affiant’s personal knowledge because he could not know what the ABC employees know or believed.

Id. at ¶ 8: The first sentence of this paragraph states, “ABC’s payroll staff was not aware of any possible error regarding ABC’s withholding tax payments until they received the Notice of Deficiency which the Department issued to ABC on February 21, 2001.” The Department objects to this statement asserting that it is not based on the affiant’s personal knowledge.

Id. at ¶ 10: The first and last sentences of this paragraph state: “ABC’s tax department and payroll staff have always acted in good faith and have always intended to comply with all Illinois withholding tax requirements. We would have made ABC’s withholding tax payments on a quarter-monthly basis if we had known of that deadline at the time of the payments. Our failure to make quarter-monthly payments was an inadvertent clerical mistake which was attributable to the 1996 reorganization described above.” The Department objects to these three sentences as being opinion and conclusions.

Id. at ¶ 12: This paragraph states the following: ”My understanding is that ABC followed the same payroll tax procedures which are commonly followed by major corporate employers. These procedures were designed to make sure that all withheld taxes were paid over to taxing

authorities on a timely basis. Thus, they would ordinarily detect a missing return or payment. However, no one at ABC detected that the Illinois payments were late because they had always been made on the same monthly schedule.” The Department objects to these statements on the grounds that they are opinions and conclusions, not factual statements based on personal knowledge.

Id. at ¶ 13: This paragraph contains the following sentence: “ABC personnel viewed Ms. Mary Doe as an industry expert in payroll.” The Department asserts that the statement regarding how ABC viewed Ms. Mary Doe is not based on personal knowledge and that it has not been established that she is an expert.

Id. at ¶ 19: The last sentence of this paragraph states, “In my view, XXX’s failure to identify the quarter-monthly payment error indicates that this type of error could be made even by experienced payroll professionals.” The Department objects to this sentence on the grounds that it is a statement of opinion not fact based on personal knowledge.

I find that the Department’s objections set forth above are well founded. The courts have held that where improper material appears in an affidavit in support of a motion for summary judgment, only the tainted portion should be excised as opposed to the entire affidavit. *Wisowaty v. Baumgard*, 257 Ill.App.3d 812, 820, 629 N.E.2d 624, 631 (1st Dist. 1994) (only those facts which were properly asserted on personal knowledge should be considered in ruling on a motion for summary judgment).

The Department’s request that the tainted material be stricken is included in its cross-motion for summary judgment rather than in a separate motion filed in advance of its cross-motion. Therefore, rather than strike the tainted matter, only those facts in the Doe affidavit that are untainted and properly asserted on his personal knowledge will be taken into account. The

conclusions, opinions and statements not made on personal knowledge as noted by the Department will be disregarded.

Next, considering the withholding tax payment and penalty issues, the relevant statutory provisions are set forth in IITA § 704.⁸ IITA § 704(a) is quite clear in requiring a taxpayer to pay its withholding taxes on the third day following the end of each quarter-monthly period if the cumulative amount withheld from employees exceeds \$1,000 per quarter-monthly period. It specifies that the quarter-monthly periods end on the 7th, 15th, 22nd and last day of each month. 35 ILCS 5/704, 86 Ill. Admin. Code § 100.7300.

The audit conducted by the Department indicated that the amounts of tax withheld by ABC during 1999 exceeded \$1,000 for each quarter-monthly period. Also, ABC admitted that it was required to pay withholding taxes for 1999 on a quarter monthly basis and that it paid withholding taxes on a monthly basis from 1996 until March of 2001. Doe aff. p. 2. Therefore, by its own admission, ABC did not make timely withholding tax payments as required by the statute during 1999.

⁸ IITA § 704(a) and (b) provide as follows:

(a) In general, every employer who deducts and withholds or is required to deduct and withhold tax under this Act shall make such payments and returns as hereinafter provided.

(b) Quarter Monthly Payments: Returns. Every employer who deducts and withholds or is required to deduct and withhold tax under this Act shall, on or before the third banking day following the close of a quarter monthly period, pay to the Department or to a depository designated by the Department, pursuant to regulations prescribed by the Department, the taxes so required to be deducted and withheld, whenever the aggregate amount withheld by such employer (together with amounts previously withheld and not paid to the Department) exceeds \$1,000. For purposes of this Section, Saturdays, Sundays, legal holidays and local bank holidays are not banking days. A quarter monthly period, for purposes of this subsection, ends on the 7th, 15th, 22nd and last day of each calendar month. Every such employer shall for each calendar quarter, on or before the last day of the first month following the close of such quarter, and for the calendar year, on or before January 31 of the succeeding calendar year, make a return with respect to such taxes in such form and manner as the Department may by regulations prescribe, and pay to the Department or to a depository designated by the Department all withheld taxes not previously paid to the Department.

Although the audit results indicate that ABC was required to file on a quarter-monthly basis during 1999, Exhibit 1 to the Doe affidavit indicates that some of ABC's employees were paid on a semi-monthly basis and some were paid on a quarter monthly basis. For some of the quarter-monthly periods, ABC's withheld taxes did not exceed \$1,000. For these periods, ABC was not required to pay the withheld taxes within three banking days following the end of the quarter-monthly period. Instead, ABC was required to pay within three banking days after the close of the following quarter-monthly period during which the accumulated unpaid withholding taxes exceeded \$1,000. However, in these cases, ABC was also delinquent because it did not pay these taxes until the 15th of the month following the close of the month in which they were withheld. 35 ILCS 5/704.

The IITA imposes penalty and interest for non-willful failure to pay withholding tax on a timely basis. IITA § 1002(c) provides that the penalty is determined under UPIA § 3-3. For 1999, UPIA § 3-3(b-5)⁹ imposed a penalty of 20% of the amount of tax that was not paid on the due date. The Department, using the only information available to it, the monthly withholding tax payments made by ABC, calculated the penalty for each quarter-monthly payment at 20% of the calculated quarter-monthly amount to arrive at the amount of penalty for each late payment. UPIA § 3-2(a) and (c) require that simple interest be assessed on tax liabilities and penalties at

⁹ Section 3-3, in relevant part, provides as follows:

(b-5) This subsection is applicable to returns due on and after January 1, 1998 and on or before December 31, 2000. A penalty of 20% of the tax shown on the return or the tax required to be shown due on the return shall be imposed for failure to pay:

- (1) the tax shown due on the return on or before the due date prescribed for payment of that tax, an amount of underpayment of estimated tax, or an amount that is reported in an amended return other than an amended return timely filed as required by subsection (b) of Section 506 of the Illinois Income Tax Act (penalty for late payment or nonpayment of admitted liability); . . . 35 ILCS 735/3-3.

the rate established under Section 6621 of the Internal Revenue Code. 26 U.S.C. § 6621. The sum of these calculations is the amount of penalty assessed on the Notice of Deficiency. Dept. Ex. No. 1; Lyons aff. pp. 5-6, Attachments E and F.

ABC argues that the Department's method of computing the penalty grossly distorts the applicable late payment penalty. It states that once the Department determined the January payments were late, all of its payments continued to be late throughout the year. To avoid that result, ABC argues that the Department should annualize the penalty. ABC states that, assuming that all of its payments were six weeks late (which is not the case here), **the proposed penalty would be 173% on an annualized basis:** [emphasis in original]

$$20\% \text{ penalty for 6 weeks} = 3\frac{1}{3} \% \text{ penalty for 1 week } [20/6]$$

$$= 173\% \text{ penalty for 52 weeks } [3\frac{1}{3} \% \times 52]$$

ABC br. p. 3.

There are no provisions in the statute or regulations that provide for annualizing the penalty. The penalty is not time sensitive. The penalty is the same whether the payment is one day late, one month late or one year late. The statutory language is clear that the penalty is the statutory percentage, 20% for 1999, multiplied by the amount of the late payment for each due date. If a taxpayer pays on a monthly basis when it should be paying on a quarter-monthly basis and continues to do so for an entire year, each quarter-monthly failure is a separate breach of the statute and the penalties obviously accumulate as they did in this case.

ABC also argues that the Department's penalty assessment is improper because it does not reflect the timing of the actual tax payments that it made. ABC asserts that the Department should reapply its monthly payments to the quarter-monthly liabilities, starting, in each case, with the oldest quarter-monthly payment, or part thereof, which is left unpaid after the preceding reapplication. ABC br. p. 4-5. This reapplication theory would reapply each of the monthly

payments taxpayer made on or about the 15th of the month throughout 1999 and on January 13, 2000 in the same fashion. ABC argues that this reapplication is required by the IITA and the UPIA and would result in a more reasonable penalty calculation. *Id.* at p. 5.

ABC's argument is baseless. There is no provision in the IITA or the UPIA that mandates or permits reapplication of withholding tax payments as urged by ABC. The Department's calculation of the penalty does reflect the timing of the actual tax payments made by ABC. The Department's calculation of the penalties recognizes the fact that ABC paid the withholding taxes by the 15th of the month following the month during which they were withheld rather than on a quarter-monthly basis during the month that they were withheld as required by the statute.

ABC argues that the Department's penalty calculation is not in accordance with UPIA § 3-9(d). UPIA § 3-9(d) provides that the Department is required to apply payments received by the taxpayer "against the outstanding liability of the taxpayer, or to an agreed portion of the outstanding liability, in the following order: the principal amount of the tax, then penalty, and then interest." 35 ILCS 735/3-9(d). ABC argues that there was no "outstanding liability" in the words of the statute or any "oldest outstanding liability" under the Department's construction of the statute because the Department did not know the dates or amounts of taxpayer's payrolls on the date of its withholding tax payments. *Id.*

ABC's assertion that there was no outstanding liability is incorrect. ABC is correct in stating that the Department did not know the amounts of ABC's quarter-monthly liabilities, but that does not lead to the conclusion that there were no quarter-monthly liabilities. If ABC's argument is correct, any taxpayer could avoid its tax liability and non-payment penalties by not filing its tax returns and not paying the tax due on the due date because the Department would have no way of knowing how much was owed, so no liability would exist. ABC's argument

does not pass the test of reasonableness. ABC was required by statute to pay its withholding taxes in accordance with the quarter-monthly schedule set forth in the statute. Therefore, its liability for the taxes accrued on the due date of each quarter-monthly payment. When these liabilities were not paid within three days after the close of the quarter-monthly period, the penalty liability was incurred. See, *People ex re. Adamowski, State's Attorney v. Public Building Commission of Chicago*, 11 Ill.2d 125, 137, 142 N.E.2d 67, 74 (1957) (when determining if an indebtedness exists, the time of incurring the liability governs, even though the liability is inchoate).

ABC argues that § 700.500¹⁰ of the regulation supports its reapplication of its monthly payments because it provides that in the absence of direction by the taxpayer regarding the application of payments, the Department will direct payments by the taxpayer to the oldest outstanding liability first.

ABC did not direct the Department to apply the payments in any specific manner. It simply paid the withholding taxes to the Department by the 15th of the month following the month during which they were withheld. For example, ABC paid the taxes withheld during January 1999 on February 12, 1999. In calculating the penalties, the Department did apply the

¹⁰ 86 IL. Admin. Code ch. 86, §§ 700.500 provides as follows:

a) Payments received from a taxpayer shall be applied against the outstanding liability of the taxpayer, or to an agreed portion of the outstanding portion of the outstanding liability, in the following order: the principal amount of the tax, then penalty, and then interest. (Section 3-9 of the Act)

b) A taxpayer may direct payment to a particular liability at the time payment is made to the Department. If a taxpayer has multiple liabilities to the Department, either based upon multiple taxes or multiple reporting periods, the taxpayer should identify the liability to which payment is to be directed.

c) In the absence of direction from the taxpayer as to which of a taxpayer's outstanding liabilities payment is to be made, the Department will direct payments made by taxpayers to the oldest outstanding liability first, with payment directed first to the principal amount of the liability and any excess then directed to penalty and then to interest. If there remain funds after application of the payment to the oldest outstanding liability in the manner noted above, the remainder will be directed to the next oldest liability in the same manner.

payments made by ABC to the oldest outstanding liabilities first. The Department applied the February 12, 1999, payment to the January 1999 quarter-monthly liabilities. They were the oldest liabilities outstanding on that date. The Department applied the succeeding monthly payments in the same fashion. Based upon these facts, ABC's argument is incorrect.

ABC argues that the Department should apply the federal income tax principle of substantial compliance to the facts of this case. According to that principle, a taxpayer that has substantially complied with a statutory requirement will not be punished if its compliance was not literally perfect. Taxpayer cites two cases in support of this argument. *American Air Filter Co. v. Comm.*, 81 T.C. 709 (1983) and *Hewlett-Packard Co. v. Comm.*, 67 T.C. 709 (1977).

Neither one of these cases supports its position. *American Air Filter Co.*, *supra*, involved a taxpayer that filed its federal income tax return for 1974, calculating its income as if a certain election had been made, but it failed to include in its return a statement that it made the election as required by the income tax regulations. The commissioner challenged the calculation because the taxpayer failed to include the required statement. The court held for the taxpayer because the omission was procedural rather than substantive, and the taxpayer substantially complied with the statutory requirements for making the election. 81 T.C at 723.

Hewlett-Packard Co. v. Comm., *supra*, involved a similar situation in which the taxpayer was found to have substantially complied with the requirements for making a statutory election even though it failed to include a statement with its tax return that met all of the requirements of the regulations. Neither one of these cases support ABC's position because there is no statutory or other authority in Illinois law adopting the substantial compliance doctrine.

However, even if the doctrine of substantial compliance were available as a defense in this case, it would not benefit ABC because by continuing to pay withholding tax on a monthly

basis when it was required by statute to pay on the quarter-monthly schedule, ABC was substantially not in compliance with the statute. ABC's compliance failure was substantive and not merely procedural. ABC failed to comply with the statute for the entire year of 1999, which means it failed to comply with the statute for all twelve months and all 48 quarter-monthly periods. The asserted facts indicate that it also failed to comply with the statute for the prior two years and the latter part of 1996 as well. This failure negates the proposition that ABC was in substantial compliance with the statute for 1999.

Next, ABC asserts that the penalty assessed against it violates the prohibition against excessive fines and cruel and unusual punishment set forth in the Eighth Amendment to the U.S. Constitution. It calculates that the annualized penalty is 173%. ABC argues that the penalty assessed by the Department is excessive and out of proportion to the error. ABC arrives at this calculation by assuming that all of its payments were six weeks late, dividing the 20% penalty by 6 to arrive at a weekly rate of $3\frac{1}{3}\%$, and multiplying that by 52 weeks to arrive at its 173 annualized rate.

ABC's argument is incorrect because the penalty imposed by UPIA § 3-3 is not time dependent. If a quarter-monthly payment is not made when due, whether it is a day late or a month late or late for a longer period of time, the statutory penalty for 1999 is an amount equal to 20% of the underpayment. The amount of the penalty does not increase with the passage of time. ABC's theory is flawed because it ignores the fact that each of its failures to make a quarter-monthly payment was a separate breach of the statute for which the statute imposed the 20% penalty, and the penalties continue to accumulate each quarter-monthly period until the taxpayer adopts the proper deposit schedule. As explained previously, if a taxpayer continues to violate

the quarter-monthly payment requirements month after month, each late quarter-monthly late payment is a separate violation of the statute, and, because of simple arithmetic, they accumulate.

In support of its argument that the penalty is excessive, ABC cites *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 2031 (1998). *Bajakajian* involved an attempt by the United States to impose the forfeiture of \$357,144 against a defendant for failure to disclose that he was carrying that amount of money when he tried to board an international flight without reporting it as required by 31 U.S.C.A. § 5316(a)(1)(A). 31 U.S.C.A. § 2322(a) makes it a crime to fail to comply with the reporting requirement, and 31 U.S.C.A. § 982(a)(1) requires the forfeiture of any property involved in a violation of the reporting requirement. The Court held that the full forfeiture requirement of the statute violated the excessive fines provision of the Eighth Amendment.

Bajakajian is distinguishable from this case for a number of reasons. First, it involves a federal criminal statute that was designed to punish individuals involved in money laundering, drug trafficking, and tax evasion. The statute in this case is a state enacted civil statute. In addition, the penalty involved in *Bajakajian* required forfeiture of 100% of the cash involved in the matter. The penalty at issue in this case is a monetary penalty equal to 20% of each underpayment. The statute does not require forfeiture of anything. In summary, ABC has cited no cases decided by any court holding that the UPIA § 3-3 penalty is excessive or in violation of the Eighth Amendment to the U.S. Constitution.

Finally, there is nothing in the record to support ABC's assertion that the reduction of the 20% penalty to 15%¹¹ by the legislature for years subsequent to 1999 demonstrates that the legislature thought the 20% penalty was excessive, nor has ABC cited any authority supporting

¹¹ P.A. 91-803 amended this section to reduce the 20% penalty to 15% effective for tax returns due after December 31, 2000.

this assertion. I find that the 20% penalty imposed by the UPIA for 1999 was neither an excessive fine nor cruel and unusual punishment prohibited by the Eighth Amendment.

ABC also argues that it should be allowed to reallocate its monthly withholding tax payments in the same way that Internal Revenue Code Section 6656(e) allows taxpayers to reallocate their federal payroll taxes within 90 days after the date of a penalty notice. The simple answer to this argument is that neither the IITA nor the UPIA contain a provision similar to Section 6656(e) of the Internal Revenue Code and there is no basis in either act for applying it to ABC's case.

ABC's final argument is that the penalties must be cancelled for reasonable cause. UPIA § 3-8 provides that the penalty imposed by UPIA § 3-3 shall not be imposed if the taxpayer shows that its failure to pay the tax when due is due to reasonable cause. 35 ILCS 735/3-8. Reasonable cause is to be determined in each case as provided in the Department's regulations. *Id.* The Department's regulations, 86 IL. Admin. Code ch. 86, § 700.400 (b), (c) and (d), provide as follows:

b) The determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.

c) A taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer's experience, knowledge, and education. Accordingly, reliance on the advice of a professional does not necessarily establish that a taxpayer exercised ordinary business care and prudence, nor does reliance on incorrect facts

such as an erroneous information return.

d) The Department will also consider a taxpayer's filing history in determining whether the taxpayer acted in good faith in determining and paying his tax liability. Isolated computational or transcriptional errors will not generally indicate a lack of good faith in the preparation of a taxpayer's return.

Under these rules, the most important factor to be considered in determining whether there is reasonable cause to abate a penalty is whether the taxpayer made a good faith effort to pay the withholding tax on a timely basis by exercising ordinary business care and prudence in doing so. Whether the taxpayer exercised ordinary business care and prudence depends on the clarity of the law or its interpretation and the taxpayer's experience, knowledge, and education.

The record in this case shows that ABC did not exercise ordinary care and prudence in complying with the statutory obligation to deposit withholding taxes on a quarter-monthly basis. The requirement to make quarter-monthly withholding tax deposits whenever the aggregate amount withheld exceeds \$500 was enacted into the statute in 1976. *Du Mont Ventilation Co. v. Dept. of Revenue*, 99 Ill.App.3d 263, 425 N.E.2d 606 (33rd Dist. 1981) The statute was amended by changing the \$500 minimum to \$1,000 by P.A. 84-341, effective January 1, 1986. 35 ILCS5/704 (2000 State Bar Edition)

Twenty years later, during the year 1996, ABC made monthly withholding tax payments, six of which exceeded \$1,000. The November and December 1996 withholding tax payments of \$117,322.10 and \$138,390.35 were paid on December 17, 1996 and January 15, 1997, respectively. For 1997, each of ABC's monthly withholding tax payments exceeded \$32,000. Each of ABC's monthly payments of withholding tax for 1998 exceeded \$40,000. These numbers suggest that, at least for some periods, quarter-monthly deposits were required during

the years 1996, 1997, and 1998 as well as for 1999. Failure to comply with the law for that period of time, on its face, shows a lack of exercise of ordinary business care and prudence.

The failure of ABC to exercise ordinary business care and prudence is demonstrated further by the number of documents containing the withholding tax rules that were sent to ABC, but not acted on. These include the Department's 1997 EFT Guidebook mailed in April 1997, Informational Bulletin FY 98-25 that was directed to withholding agents and tax practitioners and the Coupon Book and Form IL-941.

The Department also publishes a booklet entitled *Booklet IL-700 Illinois Withholding Tax Tables*. That booklet also sets forth the rules for a taxpayer to determine which periodic payment schedule it is required to follow. When ABC reorganized in 1996, its payroll expanded from a few employees in Illinois to over 100 with the consequent expansion of its payroll and withholding tax responsibilities. By 1999, its monthly payroll had expanded greatly. It is certainly reasonable to assume that businesses utilize such readily available information for purposes of complying with Illinois laws. However, there is nothing in the record to explain why Ms. Doe and Ms. Mary Doe, who were responsible for withholding tax payments for this substantial business, did not refer to some of these documents to make sure that ABC was complying with the withholding tax payment rules.

ABC argues that there is reasonable cause for its failure to comply with the quarter-monthly withholding tax rules because the Department failed to notify it of its non-compliance prior to issuing the Notice of Deficiency. This argument fails for two reasons. The Department is not required by the statute or the regulations to notify the taxpayer of its non-compliance. The statute places the quarter-monthly payment obligation on the employer because, unless the employer voluntarily complies, the Department has no way of knowing that the taxpayer is not in

compliance without an audit. Second, when the Department did contact ABC in February 2000, ABC ignored the inquiry.

ABC cites two administrative hearing decisions involving companies that incorrectly paid withholding taxes on a monthly basis but started making quarter-monthly deposits as required when notified by the Department of their error. In both cases, penalty assessments were abated. Both of these decisions are factually distinguishable from this matter.

The first decision, IT 02-5, involved a company that correctly made its withholding tax deposits on a monthly basis prior to 1999. In January of 1999, the taxpayer's payroll increased so that it was required to make its deposits of withholding tax on a quarter-monthly basis. In February 2000 the taxpayer received an inquiry from the Department regarding its withholding tax account. The company president forwarded it to the company's outside CPA and requested that he inquire about the matter and send the Department the worksheets it requested. The taxpayer complied and began making quarter-monthly withholding tax payments in May 2000.

The Department assessed the same 20% penalty for the late payments that it assessed ABC in this case. The taxpayer protested the assessment and the Department abated the penalty assessment finding that there was reasonable cause for taxpayer's late payments. The finding of reasonable cause was based on a number of factors that do not exist in ABC's case.

Most importantly, the taxpayer in IT 02-05 began complying with the quarter-monthly payment requirement as soon as it learned of the problem. ABC continued monthly payments long after it should have known that it was required to be on the quarter-monthly schedule because of all of the documents the Department provided beginning in 1997. ABC even ignored the Department's initial inquiry about its withholding account made in February of 2000 as well as a follow-up letter sent April 11, 2000. It continued to incorrectly make its withholding tax

payments on a monthly basis until after it received the Notice of Deficiency involved in this matter in 2001.

Second, the taxpayer in IT 02-5 handled its withholding tax internally with the help of a payroll service. Unlike ABC, there is no indication that the taxpayer employed experienced payroll tax specialists. These distinctions demonstrate a minimal breach of the exercise of ordinary business care and prudence in complying with the quarter-monthly withholding rules by the taxpayer in IT 02-5 in contrast to the more serious breach by ABC. Therefore, ABC's situation is not comparable to the taxpayer's situation in IT 02-5.

The second hearing decision cited by ABC, IT 01-14, is factually distinguishable from this case for similar reasons. The taxpayer had been correctly depositing its withholding tax on a monthly basis until early in 1999 when its payroll increased and it became liable to deposit the taxes on a quarter-monthly basis. It continued monthly deposits throughout 1999 and began to file on a quarter-monthly basis after receiving a Notice of Deficiency for the four quarters of 1999 in February 2000.

Here, the taxpayer did not ignore withholding tax rules for over four years, as did ABC. The decision in IT 01-14 indicates that the taxpayer did not have employees who were experienced payroll tax specialists responsible for its withholding taxes as did ABC. The taxpayer relied on an outside accountant to prepare its quarterly and year-end tax returns. There is no evidence that the taxpayer ignored the informational bulletins and other material that ABC very blatantly ignored. Also, there is no evidence that the taxpayer ignored any inquiry by the Department as ABC did in February and April 2000. These distinctions also show a minimal breach of the exercise of ordinary business care and prudence by the taxpayer in IT 01-14 rather than the substantial lack of the exercise of ordinary business care and prudence in ABC's case.

Next, ABC asserts that its reliance on Ms. Doe's supervisor, Ms. Mary Doe, who is a CPA, demonstrates reasonable cause for failing to comply with the statute. ABC cites two cases in support of this assertion.

The first case cited by ABC is *Boyle v. U.S.*, 469 U.S. 241, 105 S.Ct. 687 (1985). In that case, the taxpayer who was the executor of his mother's estate, relied on his attorney to file the federal estate tax return for the estate. Although the executor inquired about the status of the tax return, the attorney filed it three months late, and the Internal Revenue Service assessed a late filing penalty. The executor paid the penalty and filed suit in federal district court for a refund asserting that his reliance on the attorney was reasonable cause under the federal statute, so the penalty should be refunded. The District Court granted summary judgment for the executor and the Court of Appeals affirmed.

The U.S. Supreme Court reversed. The Supreme Court drew a distinction between a taxpayer's reliance on a tax expert's opinion regarding a substantive issue of law, such as whether a liability exists, and a taxpayer's reliance on a tax expert to file a tax return on time. The Court stated: "Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute." 469 U.S. at 251. "It requires no special training or effort to ascertain a deadline and make sure that it is met." *Id.* at 252. The Court held that reliance on an agent is not reasonable cause for a late filing. *Id.*

ABC's case involves unambiguous rules that specify due dates for quarter-monthly withholding tax payments. However, following the rationale of *Boyle*, even though ABC relied in part on the expertise of Ms. Mary Doe, the CPA, regarding the proper withholding tax payment schedule, ABC is still liable for the penalties assessed for late filing. As the Court stated in *Boyle*, "It requires no special training or effort to ascertain a deadline and make sure that it is

met.” *Id.* The statutory rules and regulations setting forth the withholding tax deposit rules are not difficult or complex. The rules specify that an employer must deposit withholding tax monthly, semi-monthly or quarter-monthly depending on the cumulative size of its withholding tax amount. These rules are no more complex than the rule that set the due date in *Boyle*.

The *Boyle* decision supports the position of the Department, not that of ABC, because ABC’s penalty assessment resulted from the failure to comply with due dates set forth in a clear, unambiguous statute and in the many informational documents sent to ABC by the Department, which ABC ignored. That is the same type of situation dealt with in *Boyle*. The fact that Ms. Mary Doe was a CPA does not establish reasonable cause for not making the required quarter-monthly withholding tax payments.

The second case relied on by ABC is *Burruss Land and Lumber Co. v. U.S.*, 349 F. Supp. 188 (U.S.D.C. W.D. Va. 1972) a case in which the District Court ordered a refund of penalties assessed for failure to file federal excise tax returns on the grounds that taxpayer’s reliance on house counsel’s legal opinion that returns were not required constituted reasonable cause. This case does not support ABC’s assertion in this case for two reasons. First, the advice given by the attorney in *Burruss* involved substantive legal questions, not mere filing requirements. Second, the attorney in *Burruss* conducted research and a legal analysis of the issue to arrive at a conclusion, although incorrect, of the issue involved in the case. The record in this case fails to show that ABC’s payroll tax specialist or its CPA did any research of the withholding tax filing requirements.

ABC cites two additional cases in support of its assertion that the penalties assessed should be abated for reasonable cause. The first case is *Du Mont Ventilation Co. v. Dept. of Revenue*, 99 Ill.App.3d 263, 425 N.E.2d 606 (3d Dist. 1981) In that case, the taxpayer had been

paying its withholding taxes on a monthly basis from at least August 1, 1969 through September 28, 1976, as IITA § 704 required. On October 1, 1976, the Illinois General Assembly amended IITA § 704 to require employers to remit withholding taxes quarter-monthly whenever the cumulative amount withheld exceeded \$500. *Id.* at 264. The taxpayer did not become aware of the change until the Department audited its records in December 1977 and assessed a penalty for late payment of withholding tax. *Id.* at 265.

The taxpayer protested the assessment and a hearing was held. The employee in charge of payroll tax compliance, an accountant for 25 years who also functioned as office manager, had not been notified of the change and that the company did not have a copy of the Illinois statutes. The accountant consulted with the company's outside accountants, but they also were not aware of the change. *Id.* The changes in the statute were published by C.C.H. State Tax Review on October 5, 1976, and a large number of taxpayers were not aware of the change. *Id.*

On appeal, the court held that there was no evidence of willful neglect on the part of the taxpayer, which was a statutory requirement for imposition of the penalty at that time. The court based its finding on the fact that the taxpayer did not have a copy of the Illinois statutes and neither the company's accountant nor its outside accountants were aware of the statutory change.

The *Dumont Ventilating Co.* case is factually distinguishable from this case. For the year involved in the *Dumont Ventilating Co.* case, the applicable statute provided a penalty for failure to pay on a quarter-monthly basis when required "unless it is shown that such failure [to pay the taxes] is due to reasonable cause and not due to willful neglect." *Id.* at 265. Subsequently, the statute was amended so that by 1999, the absence of willful neglect was no longer an element of reasonable cause.

Also, when ABC became liable for quarter-monthly payments, the quarter-monthly payment requirement had been in the statute for about 20 years; it was not a new requirement as in *Dumont Ventilating Co.* In addition, ABC employed an experienced payroll tax specialist and a CPA to be responsible for withholding tax administration. In *Dumont Ventilating* that responsibility was delegated to the company's accountant who doubled as office manager. That suggests that she was not necessarily a payroll tax specialist.

Finally, unlike the situation in *Dumont Ventilating Co.*, ABC registered with the Department as a quarter-monthly filer, and ABC was notified by the Department of the quarter-monthly payment requirements in April of 1997, when the Department sent ABC a copy of the EFT Guidebook that it chose to disregard. The Department also sent ABC its annual Coupon Book and Information Bulletin FY 98-25 that set forth the rules. Having this information available, the responsible ABC employees should have known the withholding tax payment rules.

In summary, the record in this matter demonstrates numerous factors that establish the lack of exercise of ordinary business care and prudence by the ABC employees responsible for withholding tax administration. For these reasons, I find that ABC has not demonstrated a good faith effort at compliance.

Therefore, for all of the reasons set forth above, it is ordered that the ABC's motion for summary judgment is denied, and the Department's cross-motion for summary judgment is granted.

Furthermore, because this order disposes of all of the issues in this matter, I recommend that the Notice of Deficiency be made final.

Date: 7/22/2003

Charles E. McClellan
Administrative Law Judge